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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD EDWARD SHELTON,

Defendant and Appellant.

G040530

(Super. Ct. No. 07NF4064)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kelly N. MacEachern, Judge. Affirmed as modified.

Melissa Schmitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Collette Cavalier and Rhonda Cartwright-Ladendorf, Deputy Attorneys General, for Plaintiff and Respondent.

THE COURT:*

A jury convicted Donald Edward Shelton of domestic battery as a misdemeanor and elder abuse as a felony. He contends his conviction for felony elder abuse must be reversed because the trial court erred when it failed to instruct the jury that it could find him guilty of misdemeanor elder abuse. We agree with the Attorney General that Shelton's felony conviction cannot be affirmed for the reason that the jury's verdict is based on the misdemeanor instruction for elder abuse provided by the trial court.

While sitting inside of her car outside of a sporting goods store, a witness saw a man screaming at a woman. When the man and woman walked around to the back of the sporting goods store, the witness followed in her car and saw the man push and then hit the woman numerous times. According to the witness, the woman received blows to the right side of her head around the temple, her right eye, and on the back of her head.

According to the witness, she called 911, and when the police arrived, the witness and her passengers described to an officer what they saw. The police identified the assailant as Donald Edward Shelton and the victim as his wife Sandra Tedesco-Shelton. During her investigation, the officer learned the Sheltons were homeless and living behind the sporting goods store. Although Mrs. Shelton had a swollen eye and blood on her nose and lip, the officer noted that Mrs. Shelton declined medical treatment.

Shelton was arrested and charged by information with domestic battery with corporal injury and elder abuse as felonies. At trial, Mrs. Shelton testified that her husband slapped her after she called him a "dirty name," but otherwise denied the battery described by the witnesses. According to Mrs. Shelton, the injuries that were observed by the police and recorded in photographs were the result of falling and hitting her eye

* Before Sills, P. J., Moore, J., and Fybel, J.

against a wall moments before the police arrived. The defense suggested Mrs. Shelton's fall was brought on by the fact that Mrs. Shelton had been drinking and her testimony that she was recently diagnosed with vertigo.

The court instructed the jury with "CALCRIM 831. ABUSE OF ELDER OR DEPENDENT ADULT (PEN. CODE § 368(C))." According to the redacted version of the instruction provided to the jury, the instruction reads, "To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant willfully inflicted unjustifiable physical pain on Sandra Tedesco Shelton[.] [¶] . . . [¶] 2. Sandra Tedesco Shelton is an elder[.] [¶] 3. When the defendant acted, he knew or reasonably should have known that Sandra Tedesco Shelton [is] an elder[.] [¶] . . . [¶] Someone commits an act willfully when he or she does it willingly or on purpose. An elder is someone who is at least 65 years old. [¶] Unjustifiable physical pain or mental suffering is pain or suffering that is not reasonably necessary or is excessive under the circumstances."

At the end of the trial, Shelton was acquitted of domestic battery as a felony, but found guilty of the lesser included domestic battery as a misdemeanor and elder abuse as a felony. The difference between felony and misdemeanor elder abuse is significant. To constitute felony elder abuse, the jury must find "circumstances or conditions likely to produce great bodily harm or death." (Pen. Code, § 368(b).) Otherwise, "circumstances or conditions other than those likely to produce great bodily harm or death" constitute a misdemeanor. (Pen. Code, § 368(c).)

Although Shelton contends his conviction must be reversed because the trial court erred when it failed to instruct the jury that it could find him guilty of misdemeanor elder abuse, we think the better reason Shelton's felony conviction cannot stand is because that is exactly what the trial court did in this case when it instructed the jury with "CALCRIM 831. ABUSE OF ELDER OR DEPENDENT ADULT (PEN. CODE § 368(C)), the misdemeanor instruction for elder abuse. The omission of a

finding by the jury that Shelton's assault was likely to produce great or bodily harm or death precludes any result other than a misdemeanor conviction.

The judgment is affirmed as modified. Because a state prison sentence is not authorized for a misdemeanor conviction, (Pen. Code, § 19) the Department of Corrections and Rehabilitation is ordered to release Shelton from custody forthwith in Orange County Superior Court case number 07NF4064. The superior court is ordered to amend the abstract of judgment to reflect that Shelton's conviction for elder abuse is a misdemeanor pursuant to Penal Code section 368, subdivision (c). The superior court is also ordered to resentence Shelton accordingly and transmit a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation forthwith.

The judgment is final as to this court forthwith.